In its regulations implementing Section 251(c)(3), the Commission required network elements be provided "in a manner that allows the requesting telecommunications carrier to provide *any* telecommunications service that can be offered by means of that network element," (47 C.F.R. § 51.307(c) (emphasis added)), and forbade incumbent LECs from imposing any condition on use of network elements that "impair[ed] the ability of a requesting telecommunications carrier to a offer telecommunications service *in the manner the requesting telecommunications carrier intends*," (*id.* § 51.309(a) (emphasis added)). Likewise, in implementing Section 252(i), the Commission forbade incumbent LECs from "limit[ing] the availability of any individual interconnection, service, or network element only to those requesting carriers that serve a comparable class of subscribers providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement." 47 C.F.R. § 51.809(a). And to make sure that incumbent LECs were not able to effect such discrimination indirectly, the Commission prohibited incumbent LECs from charging rates for elements that "var[ied] on the basis of class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide." *Id.* § 51.503(c).

But Applicants would impose restrictions that flout these mandates. For example, Condition XI would restrict competitive LECs that use the promotional loops and the platform to *serving only residential customers*. *See* Proposed Conditions ¶¶ 46(e); 48. Likewise, in order to use promotional unbundled loops, a competitive LEC would have to forego providing high speed services such as DSL and Frame Relay that compete with Applicants' services. *see id.* ¶ 46(e) (prohibiting provision of "any Advanced Services").

Even more onerous is Condition XI's prohibition on using the platform or the promotional loops to offering *exchange access* services. *See id.* ¶ 46(e) (limiting promotion loops to "residential telephone exchange service"); *id.* ¶ 48 (limiting the platform to "residential POTS service and residential Basic Rate interface ISDN service"). Since the Commission held in the *Local Competition Order* (¶ 356) and the *Third Report and Order*[114] (¶¶ 38-39) that competitive LECs could use network elements to provide exchange access services, Applicants have waged a relentless campaign to prevent the erosion of their super-competitive access charges that such usage would cause. The fact that Applicants would now seek to re-impose a limitation that the Commission has repeatedly rejected shows that they are simply unwilling to open their exchange access monopolies to effective competition.

Indeed, this limitation would ensure that the loops and network element combinations offered by Applicants would be of little value to competitive LECs. It is simply uneconomic to undertake the significant investments necessary to make use of unbundled loops or the platform unless these offerings can be used to provide both local exchange and exchange access services. Rather, in order to undertake the risks of such substantial investments and competition with entrenched incumbents, competitive LECs must be able to generate revenues from both these services – and avoid subsidizing incumbents with excessive access charges.

B. Condition XI Is Inconsistent With The Structure And Pro-competitive Purposes Of The Act

Recognizing that it would take years for competitors to construct their own facilities – to the extent that this is economically feasible – Congress in the Act created two additional mechanisms for entry into the local exchange market: total services resale and use of unbundled

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114 Third Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd. 12460 (1997).

network elements. In its *Local Competition Order*, the Commission recognized that its role in implementing the Act was not to favor one of these vehicles over the other, but to promulgate rules that would make all three viable and let market forces determine which one works best:

> The Act contemplates three paths of entry into the local market – construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each. We anticipate that some new entrants will follow multiple paths of entry as market conditions and capital permit. . . . Section 251 neither explicitly nor implicitly expresses a preference for one particular strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not regulation, for the answer.

Local Competition Order ¶ 12.

If adopted, Condition XI would amount to a total repudiation of this policy. This Condition does nothing to ensure that Applicants have fully complied with the Act's market opening requirements – *i.e.*, offering wholesale discounts that accurately effect avoidable costs, network element rates that are truly based on forward-looking, economic costs, and interconnection arrangements that are reasonable and nondiscriminatory – but is a witch's brew of targeted "promotions" that improperly seek to micro-manage how much entry there should be and in what form.

For example, as noted, new entrants could obtain the discounted unbundled loops only if they forego access to Applicants' unbundled switching. Likewise, while Condition XI would make the platform available, it caps the number of lines that can be served by competitive LECs using network element combinations, and prohibits the use of such combinations to provide any service to business customers and all but POTS (and ISDN) to residential customers.

Competitive LECs that seek to use the platform would also be required to give up offering exchange access services but instead would have to continue paying Applicants' supra-competitive access charges. They would also have to curtail any advanced services offerings. Similarly, the resale "promotion" is limited to residential customers.

C. Condition XI Is Arbitrary And Would Do Little to Promote Local Competition

Even if it made sense to require Applicants to offer special discounts for network elements used to serve residential customers – rather than ensure that new entrants can fairly compete for all customers as required by the Act – the proposed scheme will create only *de minimis* competition. Most fundamentally, the promotional discounts apply to only a small fraction of Applicants' total lines. Condition XI's caps would limit the unbundled loop discount to approximately 4.7 percent of Applicants' residential lines (and 2.8 percent of total switched lines). Similarly, Condition XI's caps would limit the platform/resale discount to approximately 7.7 percent of Applicants' residential lines (and 4.7 percent of total switched lines).[115] This amounts to little more than sleeves off of Applicants' vest. Indeed, at their current rate of growth, Applicants would likely more than make up for any lines lost by this promotion by the time the Proposed Conditions expire. For example, SBC alone added more than 1.4 million access lines over the last 12 months, almost half again more than competitive LECs will get with the loop promotional offering over a 3 year period.

Moreover, the loop discount is subject to considerable manipulation by Applicants. The 25 percent discount can be averaged across all geographic regions in Applicants' territories.

[115] These estimates are highly conservative because they assume that all the discounted offerings are purchased immediately rather than at the end of the promotional period when Applicants will serve even more lines and that customers once served do not change carriers, because a customer
(continued . . .)

Thus, Applicants can set a relatively steep discount in states that have set above-cost network element rates, and little or no discount in states that have set truly cost-based rates. Also, Applicants can load discount into states that they consider less important and weight the discount in favor of rural sections of those states where competitive LECs are unlikely to have the switches that are necessary to take advantage of the promotion. Indeed, the fact that SBC sought such flexibility is proof that rates in some states are above forward-looking, economic cost; if all states had set truly forward-looking rates, there would be no need for Applicants to set different discounts in different states.

Further, even if it were economically feasible to serve mass market residential customers with unbundled loops, Applicants cannot – or will not – provide new entrants with the access necessary to support such offerings. More specifically, where a new entrant seeks to use an incumbents' unbundled loops in connection with its own switch to provide local phone service, it requires the incumbent to provide a "coordinated hot cut" to transfer a customer from the incumbent's switch to the new entrant.[116] Failure to complete coordinated hot cuts accurately can result in prolonged loss of service for the customer. Accordingly, without coordinated hot cuts, a new entrant cannot compete effectively against incumbent LECs using unbundled loops and its own switch. But as AT&T has explained in the *UNE Remand Proceeding*, incumbent LECs, including Applicants, have not provided coordinated hot cuts in the quantities needed to

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(. . . continued)
added and lost still counts against cap totals.

[116] A coordinated hot cut includes not only the physical process of moving the loop wire to another location on the frame so that it can be cross-connected to the new entrants' network, but also such work as ensuring the existence of a dial tone and number portability.

support mass market residential customers.[117] Thus, regardless of the rate at which the promotional unbundled loops are priced, without the ability to secure relatively large volumes of coordinated hot cuts for residential customers, these promotional loops are of no value whatsoever.

Finally, the promotional offerings are unattractive because their uncertain duration and limited time make entry planning impossible.[118] The unbundled loop and resale discount promotion can be terminated if Applicants either obtain authority to provide in-region, interLATA services or if Applicants satisfy their "commitment" to provide local phone service in 15 out-of-region markets. Neither of these conditions are sufficiently certain so that a competitive LEC can base its business plans on the promotional offerings. Indeed, it would be particularly foolhardy to do so because, as explained in detail below, Applicants satisfy their commitment to serve 15 out-of-region markets simply by purchasing an existing competitive LEC.

Alternative Dispute Resolution (Condition XII)

Under the ambitious heading of "Alternative Dispute Resolution" ("ADR"), Condition XII would establish a process for resolution of "carrier-to-carrier disputes, including disputes relat[ing to the interpretation and performance of] existing interconnection agreements." *See*

[117] Comments of AT&T Corp., CC Docket 96-98, at 100-08 (FCC May 26, 1999).

[118] The inability to rely on these discounts is exacerbated by the fact that Applicants' OSS systems will be changing while these discounts are being phased out. Thus, a competitive LEC would need not only to make an initial investment to develop an interface with Applicants to initially get into the market, but the competitive LEC would also need to make an additional investments to develop interfaces compatible with the "uniform" interfaces Applicants have claimed they will develop.

Proposed Conditions, Appendix E. This proposed Condition, however, would be wholly ineffectual.

Most fundamentally, the ADR process established by Condition XII is limited to "mediation," which in contrast to arbitration, cannot achieve a resolution other than one that is voluntarily accepted by both parties. In other words, the ADR process established by Condition XII would not require Applicants to do anything more than they would do voluntarily, except perhaps to "talk" to competitive LECs. As the Commission has noted, however, incumbent monopolists "have little economic incentive to assist new entrants in their efforts to secure a greater share of [their markets]." *Local Competition Order* ¶ 10. Indeed, AT&T's experience has been that incumbent LECs, including Applicants, vigorously contest virtually every disputed issue, and rarely offer any meaningful accommodation absent legal or regulatory compulsion. That is why the mediation procedures provided under the Act and comparable provisions of state law have rarely been invoked by competitive LECs.[119]

In all events, whatever value mediation might have in the abstract, the mediation process established by Condition XII is certain to be of little use to parties – including most if not virtually all competitive LECs – with respect to interconnection agreements. That is because by its plain terms (*see* Appendix E), such parties may not invoke mediation prior to completing the dispute resolution processes created by their agreement, which typically include binding arbitration. If the dispute is resolved to the competitive LEC's satisfaction through binding

[119] For example, the Texas Public Utilities Commission has had in effect for years a rule requiring upon request mediation of disputes between incumbent LECs (including SBC) and competitive LECs, but that process has been invoked just once, to the best of AT&T's knowledge. *See* Texas Procedural Rule, Subchapter P, Section 22.303.

arbitration, the competitive LEC will have no need to resort to mediation. If not, Applicants cannot be expected to agree to do not required by the arbitrator's ruling. It is for this very reason that Congress provided under the Act that competitive LECs could chose mediation as an option *prior* to arbitration. *See* 47 U.S.C. § 252(a)(2).

Most-Favored-Nation Provisions (Condition XIII)

Although a merger condition with a properly drafted Most-Favored Nation ("MFN") provision could serve the public interest, the MFN provisions in Condition XIII proposed by Applicants contain so many significant qualifications that they are virtually certain to produce no tangible benefits to local competition.

As to the Applicants' out-of-region agreements by their competitive LEC affiliate (*see* Proposed Conditions ¶ 51), an MFN provision could benefit competition because, as the Commission has found, large incumbent LECs like Applicants "would bring particular expertise to the interconnection negotiation and arbitration process because of [their] intimate knowledge of local telephone operations." *BA-NYNEX Merger Order* ¶ 107; *see also* AT&T Petition to Deny at 22-24. Properly drafted MFN provisions could facilitate more rapid development of local competition because other carriers can easily and promptly – *i.e.*, without engaging in protracted negotiations or litigation – take advantage of the progress made by Applicants' uniquely situated competitive LEC affiliate in obtaining favorable terms in interconnection agreements. The out-of-region MFN provisions in Condition XIII, however, contain significant limitations that completely eviscerate both pro-competitive benefits that MFN provisions could potentially provide: any terms that would exist as a result of Applicants' expertise are excluded and the efficiencies gained by adopting existing terms are lost through new litigation over the meaning of the Condition's qualifications.

First, and most significantly, the MFN provision includes only terms obtained by Applicants' competitive LEC "through arbitration" (¶ 51) and excludes those voluntarily negotiated. Yet, as the Commission has recognized (*BA-NYNEX Merger Order* ¶ 107), Applicants "bring particular expertise to the interconnection negotiation . . . process" (*id.*) and terms negotiated by Applicants' competitive LEC could provide pro-competitive benefits to other carriers. Second, the out-of-region MFN provisions in Condition XIII contain numerous caveats that could require requesting competitive LECs to engage in significant negotiation or litigation to obtain the benefits of Applicants' interconnection agreements, which entirely defeats the main purpose of an MFN provision. Most notably, a requesting carrier apparently cannot incorporate any term automatically from Applicants' out-of-region interconnection agreements, because Applicants need only "make available" the terms of their agreements "through good-faith negotiation." Proposed Conditions ¶ 51. If Condition XIII requires negotiations between competitive LECs and Applicants in order to invoke the MFN provision, then it will provide no improvement whatsoever from existing law. In addition, Condition XIII does not apply to "[t]he price for such interconnection arrangement or UNE," which must be "negotiated on a state-specific basis" and perhaps ultimately arbitrated before the state commission. *Id.* Condition XIII also does not apply to terms that are not "feasible" for the particular state where the requesting carrier seeks to use the MFN provision. Applicants could rely on either of these limitations to object routinely to the use of the MFN provisions and to delay local competition by forcing the requesting carrier into litigation that this Condition was designed to avoid.[120]

Many of the same defects, as well as a few additional ones, apply to the other MFN provision in Condition XIII that requires Applicants to make terms of in-region agreements available throughout the region. *See* Proposed Conditions ¶ 52. Pricing terms are still excluded, and Applicants may still object to use of the MFN provision using the same vaguely defined "feasible" standard. *Id.*[121] In addition, and directly contrary to the out-of-region MFN, the in-region MFN in Condition XIII *excludes* all terms that Applicants must provide as a result of arbitration. Proposed Conditions ¶ 52. That restriction is plainly arbitrary and effectively reduces the benefits of this MFN provision to a commitment by Applicants to provide in one state what they have already voluntarily agreed to provide in other state – which is really no commitment at all. Indeed, this limitation actually subverts the Act's goals by creating a perverse incentive for Applicants to refuse to negotiate any terms in interconnection agreements because that would permit those terms to be imported into all other states.

[120] Although prices from one state plainly cannot be imported blindly into another state, an effective merger condition would seek to limit and to streamline any negotiations or arbitrations on pricing. In particular, Condition XIII leaves Applicants free to argue for non-TELRIC based prices or to object to use of the MFN provision by claiming that a state-specific pricing dispute exists. For example, Applicants' competitive LEC might obtain the platform in a state, but then assert that requesting carriers cannot use the MFN provision to obtain the platform in-region without an excessive glue charge, which Applicants would contend is a state-specific pricing dispute subject to negotiation and to arbitration.

[121] Likewise, both MFN provisions apply only to "any interconnection agreement or UNE," even though the Act's pick-and-choose section applies to "any interconnection, *service*, or network element." 47 U.S.C. § 252(i) (emphasis added). The only purpose of that omission could be to permit Applicants to refuse to allow competitive LECs to invoke the MFN provisions in Condition XIII for items that Applicants would assert were "services."

The Commission's own argument before the Supreme Court describing the purposes of Section 252(i) should apply equally to any MFN provisions in Condition XIII: such provisions are "a necessary means of ensuring full and nondiscriminatory competition in local telephone markets." Brief of the Federal Petitioners, *AT&T Corp. v. Iowa Utils. Bd.*, Nos. 97-825 *et al.*, at 49 (U.S. Apr. 3, 1998). Yet Commission Staff has approved significant limitations on the MFN provisions in Condition XIII that preclude competitive LECs from obtaining "access to terms and elements on a nondiscriminatory basis." *Local Competition Order* ¶ 1316.

Regional Interconnection And Resale Agreements (Condition XIV)

Like Condition XIII, Condition XIV is subject to qualifications that will likely result in additional litigation that ultimately would drain the Condition of any value. Once again, Applicants can insist upon state-by-state negotiations and arbitrations with regard to pricing and to feasibility.[122] Proposed Conditions ¶ 53. For the same reasons as discussed with Condition XIII, any qualifications on these Conditions that are not designed to reduce negotiations and

[122] Applicants should not be required to implement, pursuant to an MFN, terms that are in fact technically infeasible. However, Conditions XIII and XIV employ a vague standard of "feasible" that arguably is distinct from the Commission's definition of "technically feasible," 47 C.F.R. § 51.5, and that could require competitive LECs to litigate repeatedly the meaning of that term in numerous states using a state-specific standard. *See* Proposed Conditions ¶¶ 51-52 (Applicants need not provide any term pursuant to an MFN that is not "feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made"). Because Conditions XIII and XIV are imprecise and lack any clear standards or litigation-reducing presumptions that could possibly eliminate unnecessary, prolonged, and state-by-state litigation, they could affirmatively harm competition and should be rejected. *See also Collocation-Advanced Services Order* ¶ 45 (establishing a rebuttable presumption that a collocation arrangement established by one incumbent LEC is technically feasible for other incumbent LECs).

litigation ultimately undermine the benefits the Proposed Conditions purport to achieve in the first instance.

ARMIS Reporting (Condition XVII)

In its *BA-NYNEX Merger Order*, the Commission observed that "the existence of several Bell Operating Companies [is] an important regulatory tool" (¶ 148) and that further reductions in the number of RBOCs would present significant concerns because of the increased "potential for coordinated behavior" (¶ 156).[123] Indeed, time and time again, this Commission and state regulatory commissions have rejected pretextual claims by incumbent LECs that various procompetitive arrangements that competitive LECs have sought could not realistically be made operational by pointing to other incumbent LECs that had offered those same arrangements. Condition XVII – which requires Applicants to continue to report ARMIS data for different SBC/Ameritech operating companies separately – does not ameliorate the Commission's benchmarking concerns.

First, separate ARMIS reporting is of no value with regard to use of benchmarking to enforce the Act's nondiscrimination provisions. Put simply, separate reporting of a number or practice by companies will reveal nothing as long as they are under common control. The reason is that while they are separate companies, each will do what is more in its own best interest. But when they are joined – as Ameritech and SBC would be – they will take into account the effects of their actions on the profitability of their sister companies.

[123] *See also* Letters from Robert H. Bork to Chairman William E. Kennard, et al., CC Docket Nos. 98-141 and 98-184, at 11-21 (FCC Apr. 7, 1999).

Nor will separate ARMIS reporting have an impact on the incentives of incumbent LECs to resist pro-competitive regulation. As the Commission noted in its *BA-NYNEX Merger Order*

> On many issues, incumbent LECs as a group would best serve their collective interest if they all cooperated minimally with regulators and competitors during the process of opening their local markets to competition. On any particular issue, however, one incumbent LEC may have an incentive to cooperate with its competitors, contrary to the interests of other LECs. If the incumbent LEC cooperates, that will reduce the others' ability to refuse to cooperate in the same way (or in some other way of their own devising). This incentive for individual incumbent LECs to "break ranks" speeds the pro-competitive process.

BA-NYNEX Merger Order ¶ 154. The SBC-Ameritech merger will reduce the number of RBOCs to four, thereby greatly diminishing this "prisoner's dilemma." That Ameritech and SBC would be required to report the expenditures of each of their operating companies separately obviously does nothing to alter the impact this merger will have on the RBOCs' incentives to resist "the pro-competitive process." *Id.*

Access To Cabling In Multi-Dwelling Unit Premises ("MDUs") and Multi-Tenant Business Premises ("MTUs") (Condition XVIII)

While providing competitive LECs immediate, meaningful and nondiscriminatory access to MDU and MTU cabling would be in the public interest, Condition XVIII falls well short of requiring Applicants to provide such access. Applicants are already required by the Act to negotiate in good faith agreements for any technically feasible interconnection arrangements that a competitive LEC requests. 47 U.S.C. §§ 251(b) & (c); 47 C.F.R. § 51.301. This Condition would only require Applicants to begin "trials" regarding access to MDU and MTU cabling within six months after the Merger Closing Date and would permit Applicants to delay negotiating MDU and MTU access agreements for more than a year after the Merger Closing Date. Thus, Condition XVIII imposes "obligations" that are much less stringent than those already imposed by the Act.

Condition XVIII is flawed in several other respects as well. First, Applicants should not be given flexibility to select the five cities in which the trials should be conducted. *Cf.* Proposed Conditions ¶ 57. Second, the Condition is flawed because there is no reason why the trials should be limited to one year. *Cf. id.* ¶ 57(e). If successful, participating competitive LECs should be able to continue using existing arrangements. Third, requiring Applicants to conduct only *one* trial of an MTU and a garden apartment campus (¶ 47(b) & (c)) is obviously deficient. Fourth, permitting Applicants to recover the embedded costs of recabling and reconfiguration (¶ 57(d)) – rather than the efficient costs – provides them with every incentive to inflate costs in order to make access to MDUs and MTUs uneconomic for competitive LECs. Finally, there is no basis for limiting the requirements of Paragraph 58 – that when Applicants are hired to install new cables and/or retrofit MDUs or MTUs that they provide competitive LECs a single point of interface – to only three years. *See id.* ¶ 58. The Act's nondiscrimination provisions plainly require Applicants to provide competitive LECs with the same quality of access to MDUs and MTUs that Applicants enjoy.

Out-Of-Region Local Services (Condition XXI)

Condition XXI will not make up for the loss of competition between Ameritech and SBC. As an initial matter, Condition XXI requires even less than *Applicants conceded they would have unilaterally implemented even without the merger*. Moreover, this Condition requires Applicants to do even less than the what they claimed they would do when they first proposed their so-called National Local Entry strategy to the Commission in their Public Interest Statement.

Finally, the penalties imposed for not meeting the requirements of Condition XXI are wholly inadequate.

A. Condition XXI Materially Cuts Back On The Scope Of Entry That Applicants Concede They Would Have Unilaterally Implemented even without the Merger

The record shows that if Applicants' license transfer were to be denied outright, Applicants would have unilaterally entered at least *fifteen* of the largest markets in the United States. By contrast, as explained below in detail, Applicants have committed to entering only five major markets and can satisfy Condition XXI with entry into much smaller markets. Dr. Dennis Carlton, who filed a report in support of Applicants' Public Interest Statement, stated that if SBC and Ameritech were to "go it alone" they would *each* have unilaterally entered 15 of the largest markets in the United States. According to Dr. Carlton, SBC would have entered a number of cities in Ameritech's territory and those of other RBOCs including: Atlanta, Georgia; Baltimore, Maryland; Boston, Massachusetts; Chicago, Illinois; Denver-Boulder, Colorado; Detroit, Michigan; Milwaukee, Wisconsin; Minneapolis-St. Paul, Minnesota; New York, New York-Newark, New Jersey; Philadelphia, Pennsylvania; Phoenix, Arizona; Portland, Oregon; Seattle, Washington; and Washington D.C. Ameritech likewise would have similarly entered a number of cities in SBC's territory and those of other RBOCs including: Atlanta, Georgia; Boston, Massachusetts; Dallas, Texas; Houston, Texas; Los Angeles and Orange County, California; Louisville, Kentucky; Minneapolis-St. Paul, Minnesota; and New York, New York-Newark, New Jersey; Philadelphia and Pittsburgh, Pennsylvania; Phoenix, Arizona; St. Louis and Kansas City, Missouri; and Washington, D.C. Carlton Report, Table 1. In addition, Ameritech had already announced an intention to enter SBC's St. Louis market, and was actively implementing those entry plans at the time the merger was announced. *See* AT&T Petition to Deny at 24-27; AT&T *ex parte* on "Project Gateway," CC Docket No. 98-141 (FCC Apr. 14, 1999) (filed under seal).

The record also shows that even with unilateral entry, SBC and Ameritech each would have vigorously competed out-of-region against each other and other incumbent LECs. In the submissions made by Jack Grubman on behalf of Applicants,[124] Mr. Grubman expressly acknowledged: (1) that SBC[125] has sufficient capital to allow it to enter 30 out-of-region markets *without* having to merge with Ameritech (Grubman *ex parte* at 3); (2) that SBC could enter 30 out-of-regions profitably (Grubman Reply Aff. ¶ 8); (3) that in the wake of the Act, SBC "need[s] to undertake significant further out-of-region expansion on a facilities basis in order to address the needs of the new marketplace" and that SBC must enter out-of-region markets if it is to continue to grow (Grubman *ex parte* at 2 & Att. B); and (4) without an out-of-region strategy, Regional Bell Operating Companies such as SBC "risk losing [their] critical base of customers" (Grubman Reply ¶ 4).[126]

B. Condition XXI Materially Cuts Back On The Applicants' Original Version Of Their National Local Entry Strategy

Beyond the fact that a merger is not necessary for Applicants to engage in out-of-region competition, Condition XXI also represents a major retreat from the National Local Strategy that

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[124] Mr. Grubman filed an Affidavit in support of Applicants' Reply Comments ("Grubman Reply Aff.") and an *ex parte* on September 24, 1999 ("Grubman *ex parte*").

[125] Although his analysis of out-of-region entry was directed towards SBC, it applies with equal force to Ameritech.

[126] Mr. Grubman's statements also lay to rest claims by Applicants that they are not potential competitors because his statements demonstrate that Applicants would need to enter each other's markets in order to remain viable and that they could profitably undertake such entry.

Applicants proposed to the Commission. Details of that strategy were provided to the Commission in a confidential *ex parte* submission by Applicants in October 1998. A discussion of that document and its relation to out-of-region entry required by Condition XXI is set forth in Confidential Appendix B.

Even comparing the conditions against the public plans set forth in the Applicants' Public Interest Statement, it is apparent that the proposed conditions materially cut back on the prior commitments made by the Applicants. First, Applicants have firmly committed to entering only 15 markets – not the 30 that Applicants claimed that they would enter. This deficiency is not rectified by the further "requirement" that Applicants must enter an additional 15 markets after they have obtained authorization to provide interLATA services to at least 60 percent of their total access lines. Applicants have shown little interest in undertaking the market opening measures that are a prerequisite for authorization to provide in-region, interLATA services. Thus, this requirement perversely reduces Applicants' incentives to open their local markets and provide in-region interLATA services because doing so would trigger the obligation to undertake costly out-of-region entry. Moreover, the additional in-region interLATA authorization requirement for the additional 15 out-of-region market entry makes no sense because it is unrelated to the feasibility (or profitability) of their entry into those out-of-region markets. Applicants today are able to provide interLATA service out-of-region and thus can today bundle local and interLATA calling out-of-region.

Second, while Applicants initially proposed installing 60 large business related switches within three years of the closing of the merger (Kahan Aff. ¶¶ 55, 57), the conditions require Applicants to install 15 switches (or otherwise obtain local telephone switching capability from a party other than the incumbent LEC in that market) within that time frame (or, in the unlikely event that Applicants in the next three years obtain authorization to provide interLATA services to at least 60 percent of their total access lines, only 30).

Third, while the Applicants initially proposed "targeting" four of the six largest local markets in the first year of their plan – New York (1), Philadelphia (2), Washington D.C.(4), and Atlanta (6) (Carlton Report ¶ 6), Condition XXI requires an initial deployment in only three generally lower tiered cities: Boston (3), Miami (5) and Seattle (which with the city of Everett, now deleted, was ranked by the Applicants as number 10). The selection of these three cities for the first year is not fortuitous. SBC recently announced that it will acquire 10 percent of the Williams Communications network. Williams already has points of presence ("POPs") in Seattle, Miami and Boston.[127] According to SBC's 1998 10-K and a recent Williams press release about SBC's acquisition of this interest in Williams,[128] SBC will be Williams' preferred provider for platform products, presumably requiring SBC to provide local services for these three cities. Thus entry into these markets would have likely occurred in any event.

Fourth, while Applicants initially proposed entering the 30 largest U.S. markets, they have now committed themselves to entering only *three* of those cities before "the date by which Applicants have authorization to provide interLATA services to at least 60 percent of their total access lines," and even thereafter to only *five* of the original 30 largest U.S. markets. This results from two material alterations made by Condition XXI to the proposed National Local Strategy:

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[127] *See* <www.willtales.com/network/flash/networkmap> (providing map).

[128] *Williams Communications Forms Unique Alliance with SBC* (Feb. 8, 1999) <www.willtales.com/network/non_flash/index.html>.

- Applicants' original list of the 30 largest U.S. markets, included eleven multiple cities/single market listings. Exhibit F to the Proposed Conditions has only one - Minneapolis-St Paul. As to the others, one city pair was deleted (Providence-Warwick, ranked 29th); two previously identified as a single market ("Miami-Ft. Lauderdale" and "Denver-Boulder") are counted on Exhibit F as separate markets, so that an entry into Denver and Boulder now counts as entry into two markets rather than one; and finally the smaller of each other paired cities (such as Seattle-Everett) are deleted entirely.

- Also, the original list of thirty cities has now been supplemented with an additional twenty smaller cities that were not on the Applicants' original list. Thus, rather than entering cities such as New York City or Washington, D.C. SBC-Ameritech, can instead satisfy the Condition by entering second-tier markets such as Rochester, New York, Cedar Rapids, Iowa, or Passaic, New Jersey. The most obvious reason for substituting these smaller markets for more major markets is to reduce the probability of retaliatory entry by incumbent LECs whose markets Applicants are entering.

Finally, in their Public Interest Statement, the Applicants projected an overall penetration rate of 4 percent of the residential and small business customers in the 30 out-of region markets at the end of the 10 year planning horizon. Kahan Aff. ¶¶ 57-59, 62-63. Under the proposed conditions, the Applicants do not need to adhere to these projections. Applicants now need only *provide* facilities-based local exchange service to *one* unaffiliated *business* customer *or* one non-employee residential customer in that market (it could be the parent, sibling or child of that employee).[129] Their only obligation thereafter is that no later than 1 year after the initial deployment deadline for the market, Applicants must *offer,* not provide, local services.[130] The

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[129] The Condition's insistence on facilities-based entry is also misguided. Entry by Applicants via the platform or using other types of combinations would be of substantial benefit to competitive LECs because they would be able to obtain these same arrangements pursuant to Section 252(i) of the Act.

[130] Pursuant to the Proposed Conditions, Applicants must not only *offer* facilities based services from the 10 wire centers where it collocates and otherwise *offer* local exchange service through a combination of resale, unbundled network elements, and facilities-based service to all business and residential customers throughout the areas in that market that are within (i) the local service area of the incumbent RBOC located within the PMSA of the market, and (ii) the incumbent service area of a Tier 1 incumbent LEC serving at least 10 percent of the access lines in the

(continued . . .)

terms of the offering can be such that it is advantageous for business customers to subscribe but not lower margin residential customers. Moreover, Applicants can satisfy this "entry" requirement by simply purchasing competitive LECs, thereby doing nothing to increase the existing level of local competition.

C. The Proposed Penalties Are Ineffectual

The penalties imposed by Condition XXI provide little incentive for complying with these obligations. The sum is relatively small ($40 million per market missed), and the funds are to be paid to a telecommunications services fund to provide telecommunications services to underserved areas, groups, or persons. This would only replace other charitable giving by each Applicant.[131] Finally, it appears that Applicants have attempted to style these penalties as charitable "contributions" (¶ 61(d)) in order to deduct them for income tax purposes. Any attempt to shift the burden of Applicants' failure to comply with the Proposed Conditions to the public should be rejected out of hand. That Applicants would suggest it demonstrates their casual attitude towards serving the public interest.

(. . . continued)
PMSA.

[131] *See* <www.ameritech.com/community/givingback/index.html>; <www.sbc.com/Vital_Conn/difference.html>.

B

APPENDIX B

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